Message

From: Johnson, Bonita [Johnson.Bonita@epa.gov]
Sent: 9/20/2021 9:43:17 PM
To: Danois, Gracy R. [Danois.Gracy@epa.gov]; Able, Tony [Able.Tony@epa.gov]
Subject: A few points to get us started

- GAEPD described the desire to move waters listed for fecal coliform on the 2022 303(d) list (category 5), for which they plan to develop TMDLs (4a) before 2024, to category 3 in the 2024 305(b) report.
- To our knowledge this is unprecedented; need legal advice
- They will have to certify that there is insufficient information to determine the water quality when submitting to ATTAINs.
- 40 CFR § 130.7(6)(iv) requires a "delisting" needs to be for "good cause." **See below.** Moving waters to category 3 from 4a is delisting. 4a indicates waters are impaired with approved TMDLs.
- Essentially, since we don't approve the 305(b) report, GAEPD has inferred that 4a waters can be placed in category 3 because they are changing the indicator from fecal to *E. coli*, and they don't have data for *E. coli* that indicates that the waters are impaired.
- However, the last data obtained using fecal as the pathogen indicator indicated WQS impairments for pathogens. Thus, the TMDLs that they plan to develop are necessary.
- Changing the type of indicator used to assess the waters does not equate to not knowing the status of waters, and is not listed as good cause.
- It has been established that both fecal and *E. coli* have a relationship and can be used to determine water quality. Waters are considered impaired until data is obtained using fecal and/or *E. coli* as indicators shows that they aren't or they were listed in error, etc.

Just included part of the previous email as I was cutting and pasting.

SUBJECT: Information Concerning 2016 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions

Category 3 Assessment units should be reported here when there are not enough data and/or information to determine if WQS are impaired.

Hi Liz,
I hope that all is well. As mentioned in the email I sent on August 5, waters aren't to be delisted until data shows that water quality has improved or that they were listed in error. The main issue is that a standard was in place when the waters were listed. Due to exceedances of the standard, the waters were listed. A solution that Susan, Tyler, and we agree with is that changing the parameter of the listed waters, as impaired for pathogens, is an appropriate remedy. Once you collect sufficient data which demonstrates that under the new standard the waters should be delisted, you will need to explain in your delisting decision what was done to obtain the data and why it is appropriate to delist based on data for a different indicator (the relationship between fecal and *E. coli* as indicators).

In response to the inquiries made during our call on September 8, we have included relevant citations and information on the 106 calculations below.

1. How to manage a change in standards in the 303(d) Impaired Waters List

40 CFR § 130.7(6)(iv) requires the following:

Upon request by the Regional Administrator, each State must demonstrate good cause for not including a water or waters on the list [emphasis added]. Good cause includes, but is not limited to, more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed in the categories in §130.7(b)(5); or changes in conditions, e.g., new control equipment, or elimination of discharges.

The EPA has provided information through multiple guidance memorandums since 1994 as to how this requirement should be addressed. In the August 1997 program guidance, the EPA specifically addressed the topic of what to do when a state was in the process of revising its standards:

States may revise their water quality standards to address changes such as a Use Attainability Analysis (as provided by 40 CFR section 131.10), development of a site-specific criterion, or updated science. Several States have asked whether they may exclude waters from the State section 303(d) lists if a water quality standard is in the process of being revised to be less stringent than the standard that is in effect. They are concerned that once the water quality standard has been revised, a waterbody that was water quality-limited under the old water quality standard may not be water quality-limited under the revised water quality standard.

A decision not to list because a water quality standard is in the process of being revised would be inconsistent with the regulations cited above and the Clean Water Act, which require a State to identify "those waters within its boundaries" where controls "are not stringent enough to implement any water quality standard applicable to such waters" (section 303(d)(1)(A) of the Clean Water Act, emphasis added). Therefore, for the 1998 listing cycle, States should include on their section 303(d) lists waters that do not meet an applicable water quality standard at the time of listing, even if the standard is in the process of being revised to be less stringent. If the standard is in fact revised in the future, the water may be removed from the section 303(d) list at that time provided the water no longer meets the listing requirements. States have the discretion, of course, to assign a low priority to those waters where there is a likelihood that they may be removed from the list in the near future.

Information Concerning 2010 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions

EPA recommends that States include in their assessment methodologies a description of the rationale to be used in assigning waters to category 3. In particular, EPA regulations require States to provide in their Section 303(d) list submissions a rationale for not using any existing and readily available water quality data and information in developing the list (40 CFR 130.7(b)(6)(iii)). EPA also expects that waters identified as impaired and listed on the 303(d) list in the previous reporting cycle will not be removed from the list and placed into Category 3 in the subsequent listing cycle unless the State can demonstrate good cause for doing so, consistent with EPA regulations (40 CFR § 130.7(b)(6)(iv)). The State should explain why the data and information that formed the basis for the original listing is no longer sufficient for determining that the water is still impaired.

From: Danois, Gracy R. <Danois.Gracy@epa.gov>
Sent: Monday, September 20, 2021 4:10 PM
To: Johnson, Bonita <Johnson.Bonita@epa.gov>
Subject: FW: Scheduling Talquin Call

Bonita,

Heads up, JMG needs talking points on this.

Gracy

From: Able, Tony <Able.Tony@epa.gov>
Sent: Monday, September 20, 2021 3:23 PM
To: Danois, Gracy R. <Danois.Gracy@epa.gov>
Subject: FW: Scheduling Talquin Call

See below. I'm still on the WET call

Tony Able, Chief
Water Quality Planning Branch
Water Division
U.S. EPA R4
Atlanta GA

404 562 9273 (phone)
404 821 9066 (Cell)

From: Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>
Sent: Monday, September 20, 2021 3:08 PM
To: Able, Tony <Able.Tony@epa.gov>
Cc: Diaz, Denisse <Diaz.Denisse@epa.gov>
Subject: Fwd: Scheduling Talquin Call

Tony

I need talking points for this ASAP.

Jmg

Sent from my iPhone

Begin forwarded message:

> **From:** "Capp, James" <James.Capp@dnr.ga.gov>
> **Date:** September 20, 2021 at 2:34:53 PM EDT
> **To:** "Able, Tony" <Able.Tony@epa.gov>
> **Cc:** "Gettle, Jeaneanne" <Gettle.Jeaneanne@epa.gov>, Liz Booth <Elizabeth.Booth@dnr.ga.gov>
> **Subject: RE: Scheduling Talquin Call**
>
> OK. I'm going to be out of the office most of the time Sep 21-24, so I may be difficult to reach via phone.
>
> On Sep 1, I requested some time with Jeaneanne to discuss the transition from fecal to E.coli and the 305(b) list and potential impacts to grant funding. On Sept 1, there was a little flexibility on timing. Now, my time has just about run out if we want to go to public notice on the Triennial Review in October (which we do). How soon can we get that conversation scheduled?
>
> I've reviewed the EPA email from Bonita to Liz on Sep 17.
>
> - The funding issue was addressed generally. The math seems a bit complicated to fully grasp the potential impacts. If I am understanding it correctly, the earliest that there could be a potential impact is ~ 2026 and the impact appears to be pretty small (Maybe ~ 1-2% depending upon a lot

of factors that are difficult to estimate today). I'm not fully understanding the connection between the funding formula and the funding floor. I think it's saying that as long as the U.S. does NOT experience a funding decrease, then an individual state also does NOT see a decrease, but need to confirm my understanding.

- Unless I missed, it, the Sep 17 email did not address the 305(b) list.

From: Able, Tony <Able.Tony@epa.gov>
Sent: Monday, September 20, 2021 12:50 PM
To: Capp, James <James.Capp@dnr.ga.gov>; Julie Espy <Julie.Espy@dep.state.fl.us>
Cc: Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>
Subject: Scheduling Talquin Call

Jeaneanne' s secretary will be contacting you soon to schedule a call with you and your teams before FDEP's Oct 13 TMDL technical meeting. We would like to go over the FDEP schedule for finalizing the TMDL and any coordination that may be needed as the process moves forward. Let us know if there are other topics you would like to include.

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